

The New Court

The Alexander F. Morrison Lecture

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Justice Byron R. White liked to say that “every time a new justice comes to the Supreme Court, it’s a different court.”¹ Now that the Court is facing change of a dimension unknown for the past 34 years – two simultaneous vacancies – his observation is, of course, doubly true. It is probably even more true given the 11 years since the last Supreme Court vacancy, a record for a nine-member court without a personnel change. I can’t predict the future. So on the eve of change, whether incremental or profound, I thought it might be most useful today to look at the recent past: if we aren’t sure where we are going, at least we can try to understand where we have just been.

The reason the recent past is worth studying is that the Court really never stands still. Even during this period of stability, it wasn’t static. It was changing, whether by evolution or intelligent design. In fact, I hope it’s not too controversial to suggest to this audience that the Court’s recent behavior makes a good argument for evolution. There have been a number of would-be intelligent designers, also known as Presidents, who thought they had a chance to control, or at least to shape to Court, and they have been routinely frustrated. The Court marches to its own internal dynamic – influenced, to be sure, by events outside the Court, as I plan to discuss. But to the extent that the Court does change and evolve even while the people who occupy the bench remain the same (a period known to social scientists as a “natural court”) we have a chance, by studying such a period, to perhaps learn a bit about the Court as an institution before the pace of external change picks up and masks some of the institutional realities that this fascinating period reveals. So the title of my lecture is The New Court, and I have to tell you that it is a theme I have been working on since before the unexpected retirement announcement by Justice Sandra Day O’Connor back in July, let alone the unexpected death of Chief Justice Rehnquist just one week ago. Even while they were still on the bench, it was to a surprising degree a new Court.

On a purely personal level, of course, Supreme Court justices can and do change. We know that from Harry Blackmun, but we don't have to go back that far. We know it from Justice O'Connor, whose tenure on the Court is precisely as long, 24 years, and who is retiring as a very different justice from the one she was when she arrived from Arizona in 1981, or when she spoke disparagingly of *Roe v. Wade*² in 1983,³ or even in 1992, when she published a tribute to the newly retired Justice Thurgood Marshall and called him an embodiment of "moral truth."⁴ The experience of knowing and working with Thurgood Marshall, O'Connor said then, of sitting with him at conference for 10 years, "would, by and by, perhaps change the way I see the world."

It seemed an odd sentiment from a justice whose jurisprudence appeared to bear little of Thurgood Marshall's imprint, certainly not in the core areas of voting rights and racially conscious affirmative action. Yet "by and by," Sandra O'Connor led the Court in reasserting a role for affirmative action in university admissions, and in taking the issue off the table for 25 years.⁵ We have 23 years to go, a judicial safe harbor that may account for the fact that affirmative action, as such, has barely entered the debate over filling the Supreme Court vacancies.

Of course, it must also be acknowledged that change during a justice's career is hardly a given. William Rehnquist could be a very strategic player, one who knew when to hold 'em and when to fold 'em, but it is hard to say he ever fundamentally changed his mind about anything.⁶ And let me offer you a dissenting opinion issued this past Term that bears the name of Justice Clarence Thomas. The question in *Deck v. Missouri*⁷ was the constitutionality of shackling a defendant in the presence of the jury during the sentencing phase of a criminal trial, in this case a capital sentencing proceeding for a man who had been convicted of shooting an elderly couple to death in the course of robbing them.

The routine use of visible shackles during the guilt phase of a criminal trial has long been forbidden under a rule with deep roots in English common law, based on the presumption that the sight of a defendant tied up like a mad dog would naturally prejudice the jury. But surprisingly, the use of shackles during the punishment phase of a capital case was an open question in American law. But a majority of 7 to 2, Thomas and Scalia dissenting, the Court ruled in *Deck* that for constitutional purposes, the two

situations were the same, and that the use of shackles during the sentencing phase without special justification violates the defendant's right to due process.

We know that Justice Thomas is a traditionalist, but he argued in his dissenting opinion that tradition should not apply. Modern-day shackles were different from the pain-inducing shackles of olden times, he said. "The belly chain and handcuffs are of modest, if not insignificant weight," he wrote. "Neither they nor the leg irons cause pain or suffering, let alone pain or suffering that would interfere with a defendant's ability to assist in his defense at trial." Given that a defendant during a sentencing hearing stands before the jury as one who has already been found guilty, he said, "the Court's holding defies common sense."

I found this opinion quite startling, yet it received very little attention, in the press or on the blogs or among academic commentators. Perhaps that is because we are all inured to Justice Thomas. After all, it was in *Hudson v. McMillian*,⁸ during his first Term on the Court, that he dissented from a decision holding that the use of excessive force against a prison inmate can violate the Eighth Amendment's prohibition on cruel and unusual punishment even if no serious injury results. The Framers, Thomas said, "simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment." The 45-year-old Clarence Thomas let us know then, in the opening months of his tenure, what kind of justice he would be.

Which brings us back to Harry Blackmun, and the justice he became.⁹ Harry Blackmun was 61 years old when Richard Nixon, in an increasingly desperate search for a confirmable law-and-order nominee, named him to the Supreme Court in 1970. Before the choice was final, Attorney General John Mitchell had asked a young Justice Department lawyer to vet Blackmun's record on the Eighth Circuit. Assistant Attorney General William H. Rehnquist, discharging that assignment, pronounced Blackmun acceptable – that is, professionally respectable and predictably conservative.

And indeed, the early Justice Harry Blackmun offered few surprises. The first major constitutional confrontation during his tenure on the Supreme Court was over the death penalty, and when the Court invalidated every death penalty statute in the country in *Furman v. Georgia*¹⁰ in 1972, Blackmun dissented. When the Court ruled against the

Nixon Administration's effort to stop publication of the Pentagon Papers,¹¹ Blackmun dissented.

In 1973, he wrote the opinion for the Court in *United States v. Kras*,¹² a bankruptcy case that challenged the constitutionality of requiring a \$50 fee as a condition of filing for bankruptcy. Could the statute be applied to a person who couldn't afford to pay? Blackmun was skeptical of Robert Kras's claim that he could not afford the \$50. Kras had turned down the chance to pay the fee in installments, \$1.28 a week for nine months, Blackmun noted in the memo he wrote to himself before the argument in the fall of 1972.¹³ In his opinion for the Court, he wrote that Kras could have paid the fee for a weekly installment of "less than the price of a movie and little more than the cost of a pack or two of cigarettes." The dissents were stinging. "The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity," Thurgood Marshall wrote. William O. Douglas, another of the four dissenters, wrote about the case some months later in his memoir, *Go East, Young Man*, observing that "Never did I dream that I would live to see the day when a court held that a person could be too poor to get the benefits of bankruptcy."

Blackmun was undeterred. He was gratified more than a year later to hear from the government lawyer who had argued the case, informing him that Kras had paid the \$50 in full barely a month after the decision. "I always had a feeling that there was something wrong with this case," Blackmun responded to the lawyer. He then circulated the lawyer's letter to the dissenters.

Yet barely four years later, we see a very different Harry Blackmun, confronting the rights of the poor in another context that evoked from him a much different response. A trio of cases reached the Court during the 1976 Term on the question of the government's obligation to pay for abortions for women who could not afford them. The *Roe v. Wade* majority of three years earlier fractured over this question and left Blackmun in dissent, abandoned by Potter Stewart, Lewis Powell, and Warren Burger, all members of the *Roe* majority, and by John Paul Stevens, who had replaced Douglas. Blackmun was left to speak for the poor in his dissenting opinion in *Beal v. Doe*,¹⁴ one of the most powerful dissents of his career. "There is another world 'out there,' the

existence of which the Court, I suspect, either chooses to ignore or fears to recognize,” he wrote.

Was this the same justice whose tone had been so dismissive, even smug, in the bankruptcy case just four years earlier? What was happening to Harry Blackmun?

It’s the thesis of my book that what transformed him was the fortuity of having been assigned by his childhood friend, Chief Justice Burger, to write for the Court in *Roe*. Blackmun was shocked by the public response to *Roe* – not only by the criticism of the opinion and the outcome, but by the way in which he personally was vilified and, on the other hand, lionized. He was the one who got the hate mail, letters by the tens of thousands (he read and saved them all and gave them to the Library of Congress, which decided to preserve only a random sample), the death threats, the pickets wherever he went for the rest of his career. And on the other side, he was the one who became a hero to women’s groups in whose cause he was at most a reluctant foot soldier, if that: *Roe*, after all, was about the rights of doctors, and only incidentally about the rights of women.

Initially, Blackmun resisted the efforts by both sides to attach *Roe* to him personally. It’s not my opinion, he would say. It was the opinion of the Court. The vote was 7 to 2. I received the assignment and I discharged it. But the personification was so relentless that eventually, perhaps inevitably, Blackmun did incorporate *Roe v. Wade* into his self-image in a profound way. He was not only the father of abortion rights in America, in his own mind, but he devoted himself to becoming the defender of those rights as the climate changed both outside the Court and within it. I say “perhaps inevitably” because someone with a different personality structure might well have reacted differently, might not have read all those letters, might not have cared so intensely and taken it all so personally. But throughout his life, Blackmun displayed a tendency to personify events around him. He dwelled, he brooded, he was in pain – and in the process, he became attuned to the pain of others: to “poor Joshua” of the *DeShaney* case,¹⁵ tragic victim of an abusive father and inadequate government safety net; to those who found their way to death row through incompetent legal counsel and judicial shortcuts; to women who were victims of sex discrimination, a concept for which the Court had no constitutional language at the time it confronted the abortion cases, and to

which Harry Blackmun eventually came around in a quite grudging and ultimately rather improbably alliance with his future colleague, Ruth Bader Ginsburg.¹⁶

On one level, Harry Blackmun's Supreme Court career is an example of "path dependence," a concept with roots in the physical and geological sciences that has come to legal scholarship largely through economics. Path dependence is a way of saying that eventual outcomes depend on initial, often random conditions, that "history matters," and that incremental, even accidental choices or events can have outsized consequences.¹⁷ One paradigmatic example of path dependence is the QWERTY typewriter keyboard, an arrangement patented by its inventor and sold in 1873 to the Remington typewriter company. Its virtue was that it avoided the common problem of jammed typewriter keys by separating the most widely used letters across the keyboard. It forced typists to go slower so that they could go faster, a virtue that makes little sense with today's keyboards. But once it became the industry standard, QWERTY stood in the way of all ergonomically superior alternatives.

How might the Harry Blackmun of 1970 evolved had Warren Burger chosen someone else for the assignment in *Roe v. Wade*, if *Roe* never became for Blackmun more than just another case? Or if *Roe* had not become so embattled both inside the Court and out, leading Blackmun to assign himself the mission of defending it against all enemies? Of course we will never know the answer. But there are major areas of his jurisprudence that can plausibly be seen as grounded in *Roe*, or at least in how he experienced *Roe*.

Commercial speech, for example: without *Roe*, would the commercial speech claim in *Bigelow v. Virginia*¹⁸ have caught his interest? The speech at issue in that case was an advertisement for an abortion referral service. In writing for the Court that the advertisement was deserving of First Amendment protection, Blackmun launched a reappraisal of commercial speech that went on to bring us, for better or worse, advertising by lawyers, doctors, and other professionals and the robust and sometimes contested corporate speech that fills the airwaves today. It was one of his most important doctrinal contributions.

I think it is likely that he would not have so passionately taken up the cause of poor women in the abortion funding cases, cases that helped move him away from his

initial doctor-centered view of the abortion right and toward his eventual embrace of a unified jurisprudence of women's rights and abortion rights. Blackmun did not instinctively grasp what the young Ruth Bader Ginsburg was trying to convey to the Court during her carefully constructed strategic litigation campaign of the 1970's. But neither did he close his eyes and turn away from it, even when his law clerks advised him to do so. During this period, the Court was gradually constructing a language and jurisprudence of women's rights. Blackmun was not a leader. But the more entrenched he became in his defense of Roe, the more receptive he became to the claims of women's equality. By 1986, in his opinion in the Thornburgh case,¹⁹ we see a description of what it means to a woman to have the right to decide whether to terminate a pregnancy, a description very different in tone from the doctor-centered language of Roe: "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy . . ."

Toward the end of his career, Blackmun would occasionally deny that he had changed very much, but the statistics tell the story. In closely divided cases, he voted with Burger 87.5 percent of the time during his first five terms and with Brennan only 13 percent. During the next five years, 1975-1980, he voted with Brennan 54.5 percent of the time and Burger 45.5 percent. During the final five years that Blackmun and Burger served together, 1981-1986, Blackmun joined Brennan in 70.6 percent of the divided cases and Burger in only 32.4 percent.²⁰

What types of justices are open to change, and which are not? Can we draw conclusions from our recent experience as we contemplate the arrival of Chief Justice John Roberts and a new associate justice not yet named?

That is clearly a perilous enterprise, so I will offer only some very preliminary observations. Although Blackmun developed a sense of mission, and was propelled by it in the way I have just described, it's important to note that he did not arrive at the Court with any agenda at all (beyond survival, which early in his tenure, he doubted.) Neither did Justice O'Connor, who knew she faced a steep learning curve in making the transition from the Arizona Court of Appeals and her earlier career in elective politics. Both were consequently open to new and unexpected influences, in a way that Clarence Thomas has not been. While his world has become more insular and self-reinforcing, theirs became

more open. For 17 summers, Blackmun left Washington for the Aspen Institute, where he would conduct a seminar in which people from around the country and the world would wrestle with age-old debates about justice and society. Justice O'Connor traveled widely, interacting with judges of other constitutional courts and spending many hours working with the American Bar Association's project on the rule of law in eastern Europe. She became a champion of the idea that American courts would benefit from acknowledging legal developments in the rest of the world.

For John Roberts, the learning curve will not be nearly as steep. Few people have come to the Court as familiar with the institution and the docket. Between his service as a government lawyer and his distinguished career in private practice before the Court, there are few issues he has not confronted. He does not even have to go through the challenging experience of a mid-life move to a distant city. In changing courthouses, he will extend his daily commute from his close-in Maryland suburb by about six blocks. The forces for change that confronted Blackmun and O'Connor may be absent. David Strauss of the University of Chicago, for one, has written of Roberts that "whatever his views are now, the Senate, and the American people, should count on his being the same person throughout the 30 or so years he is likely to spend on the Court if he is confirmed."²¹

I don't see John Roberts as a judge with an agenda, on a mission to remake constitutional law. Rather, I see an insider, comfortable with the status quo, but someone willing at least on occasion to question his own premises.²² Some of you probably read the excerpts the Los Angeles Times recently picked up from his last public speech, a lecture he gave in February at Wake Forest University, well before his nomination and evidently without any thought that it would be picked up by the national media.²³ Roberts talked then about the challenge of transforming himself from a lawyer into a judge during his two years on the D.C. Circuit. "I've found that deciding cases was a lot harder than I thought it would be," he said. He explained that he had thought that coming to the "right answer" would be the easy part and that the hard work would come in opinion writing. But instead, he said, he found that he was spending far more time on the first step, deciding how the case should come out. He said it was not unusual for him to change his mind more than once during the decisional process. Lawyers who during argument

described their positions as clear or obvious were unpersuasive, he said, while those who described their cases as close, with arguments on both sides, won points from him.

This does not sound like the smart-aleck, self-assured young Reagan Revolution foot soldier of 25 years ago, half his lifetime. Which of us does sound like we did 25 years ago? The question, of course, is not what John Roberts was yesterday, but what he will be during many tomorrows.

Now let me move from the personal – justices who change – to the institutional – how it is that the Court itself changes, and why a Court that saw no new justices over a period of 11 years had become, by the time the Rehnquist Court came to an end one week ago, in many ways a new court.

The fact is that the Court and the country are participants in an ongoing conversation. It really is a two-way street – each has an impact on the other, and that impact can be quite unpredictable. This may be obvious when it comes to the “great cases,” but some less-noted cases can help bring the point into focus. I will discuss some recent cases to show you what I mean –to illustrate where the Court has been, what cues it responds to, and what kind of dialogue the justice have engaged in with the legal, political, and social culture that surrounds them.

Some of you may remember a case decided in 2003 called *Brown v. Legal Foundation of Washington*²⁴. On the surface, this decision appeared to resolve only a question of specialized interest to the legal profession: the validity of state IOLTA programs (Interest on Lawyers’ Trust Accounts) that pool the escrow deposits that lawyers hold for their clients for brief periods of time, and that then direct the interest earned on these pooled deposits to legal services for the poor. These programs, which exist in all 50 states, have been lightning rods for conservative groups that have packaged their objections not as overt opposition to government-supported legal services but as an argument against what they claim to be an unconstitutional taking of private property.

In an earlier round of this battle five years previously, the court had decided that the pooled interest was in fact the clients’ property, leaving open the decisive question of whether its use in these public programs amounted to a Fifth Amendment “taking.” As the issue came back to the Supreme Court for an answer, the stakes were more than theoretical, amounting to some \$160 million a year, or about 15 percent of all money

from private and public sources spent in this country on legal services for the poor. Given the court's prior decision, it appeared highly likely that this important source of money was about to dry up.

So those who supported the Iolita program made it their business to make sure the court at least knew what the real-world stakes were, beyond the intricacies of takings doctrine. The American Bar Association, the chief justices of the 50 states, the National League of Cities, and the attorneys general of 36 states – in other words, a fair representation of the country's legal and political establishment – filed briefs urging the court to save the program. Since the earlier decision had been 5 to 4, the program's supporters needed only one vote, and they got it: Justice Sandra Day O'Connor, who voted with the majority in the earlier decision, now joined the four previous dissenters in a majority decision holding that while the interest was private property, its public use could not be considered a taking. This conclusion was based on the real-world fact that the interest would not have existed in the first place except for the Iolita program itself. The tiny bits of interest earned by each short-term escrow account would have been consumed by the transaction costs of opening and closing the account. The property owner's loss rather than the government's gain is the measure of an unconstitutional taking, Justice John Paul Stevens wrote for the majority, and since the depositors suffered no actual loss, there was no taking.

The second case worth mentioning in this context is *Nevada Department of Human Resources v. Hibbs*²⁵, also decided during the spring of 2003. Hibbs was that term's chapter in one of the Rehnquist Court's more riveting dramas, the federalism revolution. The question, as has often been the case, was one of state immunity from suit under a law that Congress intended to apply universally, to state and private employers alike. The statute in question was the Family and Medical Leave Act of 1993, which obliges employers to provide up to 12 weeks of unpaid leave for workers, male and female, to take care of family emergencies. The constitutional question was whether Congress had the authority to abrogate the immunity the states claimed under the 11th Amendment which – to oversimplify more than a bit – bars suits against states in federal court unless Congress has invoked a proper basis of authority to declare otherwise.

This is an intricate constitutional issue more suitable for a law review article than for our gathering here today. I'll make only two points. One is that in a series of highly visible lockstep 5 to 4 decisions, the court had upheld state claims of immunity from suit under other federal laws, including among them laws against discrimination on the basis of age and disability. Congress in these statutes thought it was opening up the federal courts to suits against states, but the Supreme Court ruled that Congress had lacked the constitutional authority to accomplish that goal.

My second point here is that of all the recent federalism cases, the stakes in *Hibbs* were arguably the highest. That was because the Family and Medical Leave Act addressed sex discrimination, a category of discrimination to which the Supreme Court's precedents accord heightened judicial scrutiny. The law was aimed at removing a particular burden from women in the job market and workplace: the assumption by employers that if a problem came up at home, it was going to be the woman who took time off to deal with it. The statute's rationale was that mandating a sex-neutral leave policy would help erase the stereotype that caregiving is women's work, a stereotype that causes women to be less valued as employees.

Unlike official discrimination on the basis of age or disability, permissible as long as the government can put forward a "rational basis" for its policies, distinctions on the basis of sex are valid only if they serve an important governmental interest. (That is the point the law had come to during Harry Blackmun's time on the Court.) Under this analysis, policies that discriminate on the basis of sex (or race) stand on weaker ground, and are much more difficult to justify than those that make distinctions on some other basis that does not receive heightened scrutiny. Congress's authority under Section 5 of the 14th Amendment to enforce the Equal Protection guarantee is consequently at its peak when it comes to enacting federal legislation designed to combat these particularly troublesome forms of discrimination.

At least, such had been the accepted wisdom as *Hibbs* reached the Supreme Court, and that is what made the case so important. The court's obvious skepticism about Congress's exercise of its Section 5 authority, its new solicitude for state immunity under the 11th Amendment, had raised a real question about whether the court would continue a long tradition of deferring to Congress in these heightened-scrutiny areas. If the court

were now to rule that even here, the 11th Amendment immunity trumped Congress's power under the 14th Amendment, the federalism revolution would move from the margin to the core, raising serious questions, at least theoretically, about the validity of such basic federal civil rights laws as Title VII of the Civil Rights Act of 1964. So Hibbs attracted attention from civil rights groups, scholars of women's history, and others (including a spirited defense of the statute by the Bush Administration) – more attention than the case might have appeared, on the surface, to merit.

The Hibbs case produced the major surprise of the term. Perhaps it was not surprising that Justice O'Connor, a mainstay of the five-Justice majority in the earlier federalism cases, changed sides here, because her voting record indicates that she accords a very high value to combating sex discrimination. But I think no one would have predicted that it was Chief Justice Rehnquist who would write for the 6 to 3 majority, rejecting the states' immunity claim and upholding the power of Congress to remedy what he described as "the pervasive sex-role stereotype that caring for family members is women's work." The court endorsed the theory behind the law, finding it sufficiently "narrowly targeted" to remedy a well-documented problem for women in the public as well as private workplace. It was the first time the states had lost a major immunity case since the federalism revolution gathered steam in the early 1990's.

With that background, we can now turn to the category of "great cases." As useful laboratory experiments, I will take two cases from the same term, the University of Michigan affirmative action case and the Texas gay rights case. I will assume that these cases are still vivid in our collective memory. The University of Michigan's affirmative action policies, which explicitly took account of race in admissions to the law school and undergraduate school and concededly made it easier for minority students to gain admission to these competitive programs, were challenged by several disappointed white applicants who claimed to have been the victims of unconstitutional race discrimination. The Texas sodomy law applied only to same-sex couples, making it a crime for such couples to engage in sexual practices that were legal in Texas for opposite-sex couples. The law was challenged by two men whom the police found having sex in the privacy of their own apartment, the police having been called there by a hostile neighbor.

Those are the basic facts, and I will limit myself to a few observations. When the court agreed to hear the Michigan affirmative action cases, it appeared that the most that supporters of affirmative action could hope for would be language from somewhere in some eventual opinion that could be invoked for damage control. The court's major last word on affirmative action in higher education, the 1978 *Bakke* decision²⁶, had been dying an incremental and very public death for 15 years, and it seemed most unlikely that either of the challenged Michigan programs would survive: certainly not the undergraduate program, which gave an extra 20 points for minorities on a 150-point admissions scale, and not the law school program, either, which while promising a "holistic" consideration of each applicant's special qualities somehow managed to produce a class with the same proportion of minority students year after year. Maybe, just maybe, the court would be persuaded not to shut the door completely, but even that prospect seemed dubious.

Yet something happened during the four months between the grant of *cert.* in December and the arguments in early April that changed the polarity. I sensed the change in the weeks leading up the argument, and I wrote about it, but lacking access to the only nine people who could really tell me what was happening, I worried that the change was one of perception rather than reality. By the end of the two hours of argument, however, it was quite clear that the sun would not set on affirmative action.

Still, I think that no one leaving the courtroom that day would have predicted the scope and sweep of the majority opinion in *Grutter v. Bollinger*.²⁷ This was not some grudging acceptance of affirmative action as a lesser of evils. It was, rather, an unapologetic embrace of a proposition that put affirmative action on a stronger footing than Justice Powell's solitary opinion in *Bakke* itself: that diversity serves a compelling state interest not only as an educational tool for enriching life in the classroom, as in the *Bakke* formulation, but as a pathway for full participation by members of minority groups in the civic and economic life of the country. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized," Justice O'Connor wrote. This is not, explicitly, a rationale based on remediation of historic societal wrongs – a rationale foreclosed by the court's cases – but it is very close, projecting the asserted benefits of affirmative action

out of the classroom and onto the canvas of American history and society as a whole. A court that was widely expected to overturn *Bakke*, in other words, instead incorporated and moved beyond it.

So what happened during those months following the grants of *cert.*? As in the *Iolita* and the *Hibbs* cases, the justices had the chance to consider what was really at stake and to contemplate whether following the logical consequences of their recent precedents in each of these contested areas (takings, federalism, equal protection) took them to where they really wanted the court to be.

Of course, the justices were well aware that the mere fact of granting an affirmative action case in the current climate would galvanize the country and place the court in the full glare of public attention – from the court’s point of view, never a desirable place to be. Of course the court expected to be flooded with briefs from all sides.

But I don’t think the justices had any idea of what they were about to hear. The handful of *amicus* briefs filed at the *cert.* stage gave no hint of what was to come as both sides prepared for the argument on the merits, an argument that was, after all, 25 years in the making. Certainly the court expected to hear a defense of affirmative action from the traditional civil rights community and from colleges and universities, and it did. But briefs also poured in from Fortune 500 companies, talking about the need for a workforce that was both educated and diverse, to compete in a global marketplace. A brief from retired military officers and superintendents of the military academies described affirmative action at the service academies as essential for maintaining the diverse officer corps needed to serve an integrated military. It was clear during the argument that the justices had read this brief and at least a good sample of the others. More than 100 briefs, a record number, were filed in these cases. And as many in this audience certainly know, much credit for the litigation campaign on Michigan’s behalf goes to the president of this university.

The briefing was notable not only for numbers but for lopsided-ness: with few exceptions, the only anti-affirmative action briefs were from advocacy organizations whose mission is to oppose affirmative action. One of those exceptions was the brief filed for the petitioners by the Bush Administration. But it was so labored and internally

inconsistent – neither embracing affirmative action not opposing it, offering the Texas “10 percent” plan (guaranteeing admission to the University of Texas to the top 10 percent of every high school in the state) as the only example of an acceptably narrowly-tailored way to take race into account without explaining what relevance that approach could have for law school admissions – that there is little question that it did the Administration’s ostensible cause more harm than good.

Clearly, the opponents of affirmative action were out-briefed, but this was not simply a numbers game. The briefs gave the court a societal reality check. Who was affirmative action important to, and why? How would the country look and feel if the court actually followed the logical consequences of *Croson*²⁸, *Adarand*²⁹, *Shaw v. Reno*³⁰, and other decisions that barred counting by race in other contexts? What would it mean for higher education? What would the numbers be? What would the reaction be? Those small green booklets posed and answered those questions.

The briefs, in other words, supplied an ingredient that was crucial to the outcome of the case: a sense of the culture, in Robert Post’s phrase, the *constitutional culture*, in which the court was operating.³¹ Of course, the court was being asked to address the question in the cases as a question of law. As de Tocqueville pointed out many years ago, most great questions in American society present themselves as questions of law. But no great Supreme Court case is only a question of law. It is always also an episode in the ongoing dialogue by which the court engages with the society in which it operates and in which the justices live.

That dialogue, in fact, is the building block of constitutional culture. What do we mean by that resonant term? Again, I will refer to Robert Post. Constitutional law, he says, is law made from the perspective of the judiciary. He uses the word “culture” to refer to “the beliefs and values of nonjudicial actors.” It is in dialogue that the two come together, “so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law.” A permeable membrane separates the two. Constitutional culture is “a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution.” It is the people speaking to the Court across that membrane and the Court responding, always in the crucible of actual “cases and controversies” – not necessarily the most efficient way to convey and assimilate information, but one that

powerfully concentrates the mind because real consequences – a legal judgment – is the result.

Sometimes a case arrives rather early, sometimes even too early, in that dialogue and sometimes, as with affirmative action, it arrives when it appears there might be nothing left to say; what was perhaps most surprising about *Grutter* was that the court seemed to take stock, realign itself, and tell us something new after all.

*Lawrence v. Texas*³² also arrived on the court's docket in the midst of an ongoing constitutional conversation. By one measure, it was rather early in that conversation: there were only a handful of decisions on the books dealing with gay rights. One was overtly negative, and others were not free of ambiguity. But it seems to me that one remarkable thing about the *Lawrence* decision was that this was not the conversation the majority chose to continue. Instead, the *Lawrence* court resumed a very long running societal dialogue – one of the very oldest – about individual liberty, privacy, and freedom from government intrusion. The turn the majority made in *Lawrence* was to conclude that this was the conversation that mattered. Yes, *Bowers v. Hardwick*³³ gave the wrong answer, but what *Lawrence* really tells us is that it was the answer to the wrong question. The rights of gay people do not exist under a separate heading, detached from the larger theme and trajectory of individual rights. Instead, the constitutional status of the claims of gay men and women to “dignity” and “respect,” in Justice Kennedy's formulation, is itself a measure of the vitality of society's commitment to individual rights for all: gay rights as nothing more or less than human rights. *Lawrence v. Texas* is a supremely inclusive opinion, bringing those who had been “strangers to the law,” to use Justice Kennedy's phrase from an earlier gay-rights case, inside the protective circle defined by due process and equal protection.

Where did this come from? *Lawrence* traveled a quite different path than *Grutter*. The justices granted *cert.* in the Michigan case because there was a conflict in the federal circuits on an important issue the court had been rather transparently avoiding. For reasons of institutional legitimacy, I think, the court had to reassert control over a raging debate that was clearly not going to die down on its own. Political realists express surprise that the court would grant *cert.* on such an incendiary issue without having a clear sense of the outcome. While the Court may usually be reluctant to take a case under

those circumstances, in this instance it seems to me quite possible that the Justices concluded that the time had come when they could no longer remain silent – even if was not clear at the time what they would eventually say.

There was no such conflict over gay rights, at least in the federal courts; state courts and legislatures had been steadily dismantling the old regime of criminal sodomy laws, but there was no particular reason for the court to intervene at that moment. The only reason to take up the challenge to the Texas law was that a majority of the court had come to the conclusion that it was time to confront *Bowers* and to dismantle it. Unlike the Michigan cases, the bottom line in *Lawrence* was never in doubt. The Texas law would be overturned. The only questions were how broadly the court would rule and what analytical path it would take.

As in *Grutter*, the briefs proved unusually enlightening for the court. There was, for example, an international brief, filed by Harold Koh of Yale Law School to inform the court of legal developments in other Western judicial systems and demonstrate the error of the *Bowers* majority's generalizations about how "Western civilization" regards various sexual practices; briefs by professors of history and by a coalition of gay rights groups led by the Human Rights Campaign, likewise demonstrating that the assumptions in *Bowers* about the historical treatment of gay people were also incorrect; and briefs describing the demography, lives, and aspirations of the gay community in ways that underscored how out of synch with current perceptions and realities the *Bowers* opinion, and the premises behind it, had become. There were also important briefs from the American Bar Association and two libertarian organizations that the court recognized as repeat players, the Cato Institute and the Institute for Justice.

Clearly, the court was ready for this type of presentation when it granted *Lawrence* and specifically included the question of whether *Bowers v. Hardwick* should be overruled. The briefs offered confirmatory research to support the justices' own sense that the culture had changed, not only outside the court, but within it. It is no longer the court it was in 1986, when *Bowers v. Hardwick* was pending and an oblivious Justice Powell was able to say to a closeted gay law clerk: "I don't believe I've ever met a homosexual."³⁴ Gay men and lesbians are open in their identity, whether as law clerks and employees at the Supreme Court or as leading members of the Supreme Court bar.

Their presence is simply a given, a good deal more plausible, in fact, than the advent of a female Supreme Court justice appeared to be back in the 1970's, when I began covering the court. A female justice was seen as so fanciful a notion that such an imagined event was the stuff of comedy in a Broadway play, "First Monday in October," fewer than three years before Sandra Day O'Connor's nomination in 1981.³⁵ Perceptions can and do change, sometimes nearly overnight, on the basis of personal experience and direct observation. To adhere to the regime of Bowers would have been to negate the way a majority of the court now sees the world, and the way a majority of the justices wanted the court to appear in the world's eyes.

To return to our theme: how to understand a Court that is always in the midst of change. A combination of advocacy and opportunity – arguments in the hands of skilled lawyers reaching a court that was primed and willing to listen. A court that thought long and hard about the logical consequences of its recent precedents and turned back from following them to their logical conclusions – from following them, if you will, off the cliff. A court composed of men and women who, despite their exalted positions, live in the world as employers, spouses, parents, grandparents, and have seen the world change around them. A court engaged in an ongoing constitutional conversation, in which all of us as devoted court-watchers are not only privileged but obliged to take part.

The recent majority opinions have been criticized in some quarters for paying insufficient attention to formal doctrine, to levels of scrutiny and standards of review. For example, Charles Fried of Harvard Law School, a former Solicitor General and member of the Massachusetts Supreme Judicial Court, wrote recently in the New York Times that the Court has fallen into a pattern of "defending principles in theory but abandoning them in fact." He criticized the Court for "a fin-de-siecle jurisprudence, where the court serves as nothing more than an ad hoc arbiter of issues it finds too difficult to decide in a principled way."³⁶ As you can tell, that is not my view. Clearly, this Court has been less concerned with satisfying the law reviews than it is about satisfying itself that its opinions make sense in the real world. As John Jeffries wrote in a recent reappraisal of Justice Powell's opinion in *Bakke*, what some may criticize as a "failure to achieve intellectual clarity" may better be described as a "sacrifice of cogency for wisdom."³⁷

Now there will be new voices added to the conversation – people who will undoubtedly change the court, and just as inevitably will be changed by it in turn, as will we all.

¹ See, e.g., Dennis J. Hutchinson, *The Man Who Once Was Whizzer White*. New York: The Free Press, 1998, at 467.

² *Roe v. Wade*, 410 U.S. 113 (1973).

³ *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), O'Connor dissenting.

⁴ Sandra Day O'Connor, "A Tribute to Justice Thurgood Marshall: The Influence of a Raconteur." 44 Stan. L. Rev. 1217 (June 1992).

⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁶ Linda Greenhouse, "The Last Days of the Rehnquist Court: The Rewards of Patience and Power." 45 Ariz. L. Rev. 251 (Summer 2003).

⁷ *Deck v. Missouri*, 125 S. Ct. 2007 (May 23, 2005), Thomas dissenting.

⁸ *Hudson v. McMillian*, 503 U.S. 1 (1993).

⁹ Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*. New York: Times Books/Henry Holt, 2005.

¹⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹¹ *New York Times v. United States*, 403 U.S. 713 (1971).

¹² *United States v. Kras*, 409 U.S. 434 (1973).

¹³ The Kras episode is recounted in *Becoming Justice Blackmun*, pp. 108-110.

¹⁴ *Beal v. Doe*, 432 U.S. 438 (1977).

¹⁵ *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

¹⁶ Linda Greenhouse, "The Evolution of a Justice." *The New York Times Magazine*, April 10, 2005, p. 28.

¹⁷ See generally, Linda Greenhouse, "Harry Blackmun: Independence and Path Dependence," *Hastings Law Journal* (forthcoming, 2005).

¹⁸ *Bigelow v. Virginia*, 421 U.S. 809 (1975).

¹⁹ *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

²⁰ Data compiled by Joseph F. Kobylka, cited in *Becoming Justice Blackmun*, p. 235.

²¹ David A. Strauss, "It's Time to Deal with Reality: The Myth of the Unknown Supreme Court Justice Debunked." *Chicago Tribune*, August 7, 2005.

²² While this lecture was delivered on the eve of the Senate confirmation hearing, which took place from September 12-15, 2005, nothing that emerged during the hearing has changed the basic assessment reflected here.

²³ Maura Reynolds, "Judge Roberts's View From the Bench," *Los Angeles Times*, Aug. 10, 2005, p. A9.

²⁴ 538 U.S. 216 (2003).

²⁵ 538 U.S. 721 (2003).

²⁶ *Regents of the University of California v. Bakke*, 438 U.S. 912 (1978).

²⁷ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁸ *City of Richmond v. Croson*, 488 U.S. 469 (1989).

²⁹ *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

³⁰ 509 U.S. 630 (1993).

³¹ Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*. 117 Harvard. L. Rev. 1 (Nov. 2003), at 8 ("I shall use the term "culture" to refer to the beliefs and values of nonjudicial actors.")

³² *Lawrence v. Texas*, 539 U.S. 558 (2003).

³³ 478 U.S. 186 (1986).

³⁴ Quoted in John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.*, (New York: Charles Scribner's Sons, 1994) at 521.

³⁵ The play, presented as a comedy, was written by Jerome Lawrence and Robert E. Lee. It ran on Broadway for 17 previews and 79 performances in the fall of 1978.

³⁶ Charles Fried, "Courting Confusion." *The New York Times*, Oct. 21, 2004, A29.

³⁷ John C. Jeffries, Jr., "Bakke Revisited." 2003 Sup. Ct. Rev. 1, at 21.